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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 STEPHEN TILLOTSON,

12 Plaintiff,

13 vs.

14 BONNIE DUMANIS, individually and in
15 her official capacity as District Attorney
16 for the County of San Diego; COUNTY
OF SAN DIEGO, a municipal
corporation,

Defendants.

CASE NO. 10cv1343 WQH (MDD)

ORDER

17 HAYES, Judge:
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19 The matters before the Court are the Motion for Summary Judgment filed by
20 Defendants Bonnie Dumanis and the County of San Diego (ECF No. 31) and the Motion for
21 Summary Judgment filed by Plaintiff Stephen Tillotson (ECF No. 32).

22 **I. Background**

23 On June 25, 2010, Plaintiff Stephen Tillotson filed a Complaint (ECF No. 1) and on
24 August 9, 2010, Plaintiff filed a First Amended Complaint pursuant to 42 U.S.C § 1983. (ECF
25 No. 10). The First Amended Complaint alleges that Defendants violated Plaintiff's
26 Constitutional right to procedural and substantive due process¹ by placing Plaintiff on the San
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28 ¹ Plaintiff's claim for violation of substantive due process was dismissed.

1 Diego County *Brady*² Index and seeks injunctive relief and damages.

2 On August 23, 2010, Defendants filed a Motion to Dismiss. (ECF No. 13). On
3 November 8, 2010, this Court granted in part the Motion to Dismiss and dismissed Plaintiff's
4 substantive due process claim and request for damages. (ECF No. 16). On December 15,
5 2010, Defendants filed an Answer. (ECF No. 17).

6 On October 27, 2011, Defendants filed a Motion for Summary Judgment. (ECF No.
7 31). Plaintiff filed an Opposition. (ECF No. 36). Defendants filed a Reply. (ECF No. 38).

8 On November 14, 2011, Plaintiff filed a Motion for Summary Judgment. (ECF No. 32).
9 Defendants filed an Opposition. (ECF No. 37). Plaintiff filed a Reply. (ECF No. 39).

10 **II. Undisputed Material Facts**

11 In 1998, Plaintiff was employed as a law enforcement officer by the San Diego County
12 Sheriff's Department. (Tillotson Decl., ECF No. 32-2 at 108). Plaintiff's supervisor required
13 Plaintiff to participate in periodic firearm qualification shooting exercises. (Tillotson Depo.,
14 ECF No. 31-5 at 21). In June 1998, Plaintiff told his supervisor that he attended a qualification
15 shoot that he did not actually attend. *Id.* at 20. Plaintiff gave his supervisor a certification card
16 from a prior shooting exercise as documentation that he had attended the most recent
17 qualification shoot. *Id.* at 22. Within the next 24 to 48 hours, Plaintiff told his supervisor that
18 he had "made a big mistake" and had "lied to him about [attending the qualification shoot] and
19 [that Plaintiff] felt bad about it." *Id.* In December 1998, Plaintiff was fired for the incident
20 of dishonesty to his supervisor and presenting the prior shooting certification card as
21 documentation that he had attended the most recent qualification shoot. *Id.* at 25.

22 In June 2000, Plaintiff was hired by the Sycuan Tribal Police Department after fully
23 disclosing the prior incident of dishonesty. (Tillotson Decl., ECF No. 32-2 at 108).

24 In the fall of 2008, Plaintiff applied to work as a Volunteer Reserve Police Officer for
25 the Coronado Police Department. *Id.* at 109. Plaintiff disclosed the prior incident of
26 dishonesty. *Id.* The City of Coronado Police Department contacted the San Diego District
27 Attorney's Office to review Plaintiff's prior incident of dishonesty and determine whether it

28 ² *Maryland v. Brady*, 373 U.S. 83 (1963)

1 required that Plaintiff be included on the *Brady* Index. *Id.*

2 Deputy District Attorney David Williams is the *Brady* Index coordinator for the San
3 Diego District Attorney's Office. (ECF No. 31-3 at 1). Williams states that the San Diego
4 District Attorney's Office maintains a *Brady* Index "so that [the San Diego County District
5 Attorney's Office] can notify prosecutors when there is information about an officer that
6 should be reviewed for potential discovery when the officer is a witness on a prosecution
7 case." (Williams Depo., ECF No. 32-1 at 39-40). In *Brady*, the United States Supreme Court
8 held that "suppression by the prosecution of evidence favorable to an accused upon request
9 violates due process where the evidence is material either to guilt or to punishment,
10 irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. In *United*
11 *States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court held that the prosecution has the duty
12 to turn over material evidence favorable to the accused, even when the accused has not asked
13 for such evidence. *Agurs*, 427 U.S. at 106. In *United States v. Bagley*, 473 U.S. 667 (1985),
14 the Supreme Court held that a prosecutor also has a duty to disclose information that a criminal
15 defendant may use to impeach a government witness. *Bagley*, 473 U.S. at 676. In *Giglio v.*
16 *United States*, 405 U.S. 150 (1971), the Supreme Court held that, whether nondisclosure of
17 *Brady* information is a result of negligence or is intentional, it is the responsibility of the
18 prosecutor to ensure that there is communication of all relevant information on each case.
19 *Giglio*, 405 U.S. at 154-55.

20 The San Diego County District Attorney's Office maintains three documents regarding
21 its *Brady* policy including: the *Brady* File Review Protocol, the San Diego County District
22 Attorney *Brady* Index FAQs, and the Legal Policies Guide. (Ex. to Williams Depo., ECF No.
23 31-5 at 78-83; ECF No. 32-1 at 155-157; Ex. to Gaspard Decl., ECF No. 32-2 at 2-4). In an
24 answer to an interrogatory which asked whether the San Diego County *Brady* documents
25 articulate a standard for when law enforcement officers should be placed on the San Diego
26 County *Brady* Index, Defendant Dumanis responded, "No. The factors to be considered for
27 inclusion in the San Diego District Attorney's *Brady* Index are articulated in *Brady v.*
28 *Maryland* and its progeny." (Dumanis Interrogatories, ECF No. 32-1 at 30-31).

1 The San Diego District Attorney has delegated the authority to make decisions
2 regarding whether someone should be placed on the *Brady* Index to a committee of senior
3 deputy district attorneys. (Williams Depo., ECF No. 31-5 at 62). A member of the *Brady*
4 committee acts as a “gatekeeper” which is a “specific term of art [used by Defendant] for a
5 member of the *Brady* committee who acts as the gatekeeper of information from all other
6 sources.” (Williams Depo. ECF No. 32-1 at 139).

7 Plaintiff spoke with the *Brady* gatekeeper assigned to his case who asked Plaintiff to
8 submit a statement. (Tillotson Depo., ECF No. 31-5 at 30). On September 9, 2008, Plaintiff
9 submitted a voluntary statement to the *Brady* committee regarding why he should not be placed
10 on the *Brady* Index. *Id.* at 30, 86-99.

11 On October 29, 2008, Tillotson was placed on the *Brady* Index maintained by the San
12 Diego District Attorney’s Office. (ECF No. 31-5 at 134). On that same day, the San Diego
13 District Attorney’s Office sent Tillotson a letter explaining that he was being placed on the
14 *Brady* Index based on the prior incident of dishonesty stating: “Stephen Tillotson was fired
15 from the San Diego Sheriff’s Department on 12/18/98 for Dishonesty.” (ECF No. 134). The
16 letter stated that “[a]dditional information concerning this material is welcomed from the
17 officer or agency.” *Id.* The “*Brady* Index Frequently Asked Questions” also states that
18 “further information and input from the officer or agency is welcomed. Additional material or
19 information received from the officer or agency will be reviewed by the Committee to
20 determine if the screened material should be removed from the *Brady* Index, or that the
21 additional submitted material should be included in the *Brady* Index for review by DDAs in
22 the future along with the other *Brady* Index material.” (ECF No. 31-5 at 139). The document
23 also states that “[i]n the event additional information from the officer or other sources reviewed
24 by the *Brady* Committee results in the determination by the *Brady* Committee that the original
25 basis of Index inclusion no longer applies, the officer may be removed from the Index.” *Id.*
26 at 141-42.

27 In November 2008, after being notified of his inclusion on the San Diego County’s
28 *Brady* Index, the Sycuan Tribal Police Department terminated Plaintiff’s employment.

1 (Tillotson Decl., ECF No. 32-2 at 109). The Sycuan Tribal Police Department told Plaintiff
2 that his placement on the *Brady* Index was the reason for his termination. *Id.*

3 After being notified of his inclusion on the *Brady* Index, the Coronado Police
4 Department denied Plaintiff's application to work as a Volunteer Reserve Police Officer. *Id.*
5 The Police Chief for the Coronado Police Department told Plaintiff that he was no longer being
6 considered for the position because of his placement on the *Brady* Index. *Id.*

7 After Plaintiff was placed on the San Diego District Attorney's *Brady* Index, Plaintiff
8 applied for employment as a police officer the City of Oceanside Police Department, the City
9 of San Diego Police Department and the Riverside County Sheriff's Department. (Tillotson
10 Depo., ECF No. 31-5 at 5-6). Plaintiff did not receive an offer of employment. *Id.* Plaintiff
11 was not told why he did not receive an offer of employment from the Riverside County
12 Sheriff's Department. *Id.* at 14. Plaintiff was told by an employee at the San Diego Police
13 Department that Plaintiff's inclusion on the *Brady* Index "was a factor" for his denial of
14 employment. *Id.* at 13. Plaintiff was told that his inclusion on the *Brady* Index was the reason
15 he was not offered employment by the City of Oceanside Police Department. *Id.* at 7-8.

16 The San Diego County District Attorney's *Brady* Index contains the names of 6 to 10
17 individuals who are still employed as police officers. (Williams Depo., ECF No. 31-5 at 74).

18 **III. Contentions of the Parties**

19 Plaintiff contends that Defendant violated his liberty interest in pursuing his chosen
20 profession because his placement on the *Brady* Index prevents him from pursuing a career as
21 a police officer. Plaintiff contends that no law enforcement agency will hire him. Plaintiff
22 contends that he was denied procedural due process protections on the grounds that there is no
23 single comprehensive *Brady* policy for San Diego. Plaintiff contends that the informal *Brady*
24 procedures "arbitrarily reject the materiality standard of *Brady*." (ECF No. 32-2 at 11).
25 Plaintiff also contends that he could not have pursued his claim in state court because he is not
26 appealing the decision of an administrative agency.

27 Defendants contend that there is no liberty interest at stake in this case because Plaintiff
28 has not been permanently barred from public employment. (ECF No. 31 at 7). Defendants

1 contend that placement on San Diego County's *Brady* Index does not result in a complete
2 prohibition of Plaintiff's right to pursue his chosen profession of becoming a police officer in
3 other counties within California or in other states. Defendants contend that even if the Court
4 finds that Plaintiff had a liberty interest at stake in this case, Plaintiff was provided adequate
5 procedural protections on the grounds that: (1) Plaintiff received notice that the committee was
6 considering whether he should be placed on the *Brady* Index; (2) Plaintiff knew what conduct
7 made him a potential candidate for the *Brady* Index; (3) Plaintiff submitted written materials
8 to the *Brady* committee; (4) there was no need for an oral hearing because there were no
9 disputed issues of fact; (5) Plaintiff was provided a written explanation for the committee's
10 decision to place him on the *Brady* Index; and (6) Plaintiff was informed that he could submit
11 additional information to the committee which would be reviewed to determine if he should
12 be removed from the *Brady* Index. Defendants contend that there are adequate state remedies
13 available to Plaintiff because Plaintiff could have filed a complaint in state court alleging a
14 violation of the due process clause of the California Constitution. (ECF No. 31 at 6; 38 at 3).

15 Summary judgment is appropriate if there is no genuine issue as to any material fact
16 and the moving party is entitled to a judgment as a matter of law. *See* FED. R. CIV. P. 56(c).
17 The moving party has the initial burden of demonstrating that summary judgment is proper.
18 *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970). The burden then shifts to the
19 opposing party to provide admissible evidence beyond the pleadings to show that summary
20 judgment is not appropriate. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 324 (1986). "In
21 considering a motion for summary judgment, the court may not weigh the evidence or make
22 credibility determinations, and is required to draw all inferences in a light most favorable to
23 the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997); *see also*
24 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

25 To avoid summary judgment, the nonmovant must designate which specific facts show
26 that there is a genuine issue for trial. *See Anderson*, 477 U.S. at 256; *Harper v. Wallingford*,
27 877 F.2d 728, 731 (9th Cir. 1989). A "material" fact is one that is relevant to an element of
28 a claim or defense and whose existence might affect the outcome of the suit. *Matsushita Elec.*

1 *Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The materiality of a fact is
2 thus determined by the substantive law governing the claim or defense. *See Anderson*, 477
3 U.S. at 252; *Celotex*, 477 U.S. at 322; *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

4 **IV. Discussion**

5 “A procedural due process claim has two distinct elements: (1) a deprivation of a
6 constitutionally protected liberty or property interest³, and (2) a denial of adequate procedural
7 protections.” *Brewster v. Board of Educ. of Lynwood Unified School Dist.*, 149 F.3d 971, 982
8 (9th Cir. 1998).

9 **A. Liberty Interest**

10 “[T]he right to ... follow a chosen profession free from unreasonable governmental
11 interference comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment”
12 *Greene v. McElroy*, 360 U.S. 474, 492 (1959). The liberty component of the Fourteenth
13 Amendment’s Due Process Clause may be violated by “a complete prohibition of the right to
14 engage in a [professional] calling.” *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999); *see also*
15 *Lowry v. Barnhart*, 329 F.3d 1019, 1023 (9th Cir. 2003).

16 The *Brady* Index maintained by the San Diego County District Attorney’s Office
17 enables prosecutors to be notified of “information about an officer that should be reviewed for
18 potential discovery when the officer is a witness on a prosecution case.” (Williams Depo.,
19 ECF No. 32-1 at 39-40). “The factors to be considered for [an officer’s] inclusion in the San
20 Diego District Attorney’s *Brady* Index are articulated in *Brady v. Maryland* and its progeny.”
21 (Dumanis Interrogatories, ECF No. 32-1 at 30-31).

22 Plaintiff has submitted evidence that he was not hired by law enforcement agencies and
23 that he was told that he was not hired based on his inclusion on the *Brady* Index. However,
24 Plaintiff has failed to submit any evidence that law enforcement organizations are completely
25 prohibited from hiring an individual who is listed on the *Brady* Index. The evidence shows
26 that inclusion on the San Diego County District Attorney’s *Brady* Index is not an absolute bar

27 ³ Plaintiff asserts that his constitutionally protected liberty interest has been violated by
28 a complete prohibition of his right to engage in his chosen profession. Plaintiff does not assert
that a constitutionally protected property interest has been violated.

1 to employment as a police officer in San Diego County. The evidence shows that the *Brady*
2 Index contains the names of 6 to 10 individuals who are still employed as police officers
3 despite their placement on the *Brady* Index. (Williams Depo., ECF No. 31-5 at 74). Viewing
4 the facts in the light most favorable to Plaintiff, the Court finds that Plaintiff has shown that
5 inclusion on the San Diego District Attorney's *Brady* Index may be considered a negative
6 factor for law enforcement employment. Plaintiff has failed to show that inclusion on a
7 District Attorney's *Brady* Index is "a complete prohibition of the right to engage in a
8 [professional] calling." *Conn*, 526 U.S. at 291-92.

9 The Court concludes that Plaintiff has failed to demonstrate the existence of an issue
10 of material fact with respect to his claim of deprivation of a constitutionally protected liberty
11 interest. *See Celotex*, 477 U.S. at 325. Accordingly, Defendants are entitled to summary
12 judgment on Plaintiff's claim for violation of procedural due process.

13 **B. Adequate Procedural Protections**

14 "A threshold requirement to ... procedural due process claim is the plaintiff's showing
15 of a liberty or property interest protected by the Constitution." *Stiesberg v. State of Cal.*, 80
16 F.3d 353, 356 (9th Cir. 1996) (quoting *Wedges/Ledges of California, Inc. v. City of Phoenix,*
17 *Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994)). "[T]he requirements of due process are 'flexible and
18 cal[l] for such procedural protections as the particular situation demands[]'" *Wilkinson v.*
19 *Austin*, 545 U.S. 209, 224 (2005) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); *see*
20 *also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).⁴ Courts generally consider the following
21 factors to determine procedural due process:

22 First, the private interest that will be affected by the official action; second, the

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24 ⁴ Defendants also contend that Plaintiff's § 1983 claim is barred because he could have
25 pursued a cause of action for violation of his California Constitutional right to due process.
26 In *Parratt v. Taylor*, 451 U.S. 527 (1981), the Supreme Court held that a § 1983 claim does
27 not exist for a random, unauthorized deprivation of liberty or property where there are
28 adequate post-deprivation procedures are available under state law. *See Parratt*, 451 U.S. at
541-44. However, the *Parratt* bar does not apply to deliberate, prescribed conduct by state
officials acting under authority of state procedures, regulations or directives. *See Piatt v.*
MacDougall, 773 F.2d 1032, 1036 (9th Cir. 1985). Plaintiff's claim is not based on a random,
unauthorized deprivation of liberty for which there are post-deprivation procedures are
available under state law. Accordingly, Plaintiff's claim is not barred by *Parratt v. Taylor*, 451
U.S. 527 (1981).

1 risk of an erroneous deprivation of such interest through the procedures used,
2 and the probable value, if any, of additional or substitute procedural
3 safeguards; and finally, the Government's interest, including the function
involved and the fiscal and administrative burdens that the additional or
substitute procedural requirement would entail.

4 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

5 Although Plaintiff has failed to meet the threshold requirement of showing of a
6 liberty interest protected by the Constitution, the Court will consider whether he was afforded
7 adequate procedural protections. In this case, the private interest that will be affected by the
8 official action is Plaintiff's placement on the *Brady* Index and its affect on his potential
9 employment with a law enforcement agency. The principles of *Brady v. Maryland* and its
10 progeny guides the District Attorney's Office's decision regarding whether any particular
11 individual should be listed on the *Brady* Index. The evidence shows that prior to the *Brady*
12 committee's review of Plaintiff's case, Plaintiff was permitted an opportunity to submit a
13 voluntary statement regarding why he should not be placed on the *Brady* Index. (Tillotson
14 Depo., ECF No. 31-5 at 30, 86-99). The evidence shows that the *Brady* committee sent
15 Plaintiff a written explanation of their decision. The evidence shows that Plaintiff remains able
16 to submit additional material or information regarding his placement on the *Brady* Index which
17 would "be reviewed by the Committee to determine if the screened material should be removed
18 from the *Brady* Index." (ECF No. 31-5 at 139). The risk of an erroneous deprivation of a
19 private interest through the procedures used is low. The Government's interest in maintaining
20 the *Brady* Index is strong because disclosure of *Brady* information is the responsibility of the
21 prosecutor who must ensure that there is communication of all relevant information on each
22 case. *See Giglio*, 405 U.S. at 154-55.

23 Viewing the facts in the light most favorable to Plaintiff, the Court finds that Plaintiff
24 was afforded adequate procedural protections on the grounds that (1) the principles of *Brady*
25 *v. Maryland* and its progeny guides the District Attorney's Office's decision regarding whether
26 any particular individual should be listed on the *Brady* Index; (2) an individual is permitted an
27 opportunity to submit a voluntary statement regarding why he should not be placed on the
28 *Brady* Index; (3) an individual is provided a written explanation of the *Brady* committee's

1 decision; and an individual is permitted to submit additional material or information regarding
2 his placement on the *Brady* Index which is reviewed to determine if the individual should be
3 removed from the *Brady* Index. *See Wilkinson*, 545 U.S. at 229 (balancing the factors to
4 determine whether the requirements of procedural due process were met and finding as a
5 matter of law that they were).

6 The Court concludes that Plaintiff has failed to demonstrate the existence of an issue
7 of material fact with respect to his claim of denial of adequate procedural protections. *See*
8 *Celotex*, 477 U.S. at 325. Accordingly, Defendants are entitled to summary judgment on
9 Plaintiff's claim for violation of procedural due process.

10 **V. Conclusion**

11 IT IS HEREBY ORDERED that the Motion for Summary Judgment filed by
12 Defendants Bonnie Dumanis and the County of San Diego (ECF No. 31) is GRANTED and
13 the Motion for Summary Judgment filed by Plaintiff Stephen Tillotson (ECF No. 32) is
14 DENIED.

15 DATED: February 28, 2012

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17 **WILLIAM Q. HAYES**
18 United States District Judge
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